

- (1) Whether respondent's appeal from the September 9, 1997, order was timely pursuant to K.S.A. 44-551(b)(1), as amended.
- (2) Whether claimant filed timely written claim pursuant to K.S.A. 44-520a as it relates to respondent Clifton Homes, Inc.
- (3) Whether claimant suffered accidental injury arising out of and in the course of his employment with respondent; i.e., whether claimant is a statutory employee of Clifton Homes, Inc., pursuant to K.S.A. 1995 Supp. 44-503 or whether claimant is a self-employed independent contractor, not entitled to workers compensation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant suffered accidental injury on December 11, 1995, when a truss from a house fell on him. Claimant suffered substantial injuries to his head and body and has incurred nearly \$15,000 in medical expenses as a result. Claimant has not worked since the date of accident.

It is uncontradicted that claimant is a self-employed independent contractor performing framing work. He has no other employees other than himself and in the year prior to his accident earned slightly over \$9,600 in income. Claimant has neither workers compensation insurance nor health insurance.

Claimant was contracted by Cook Construction to perform certain framing work at a structure which was being built by Clifton Homes, Inc., with Cook Construction as the primary contractor. Cook Construction has only one employee, that being David Ray Cook. It is further uncontradicted and was found by the Administrative Law Judge at the preliminary hearing of July 8, 1997, that Mr. Cook has no total gross annual payroll for the year 1994 or 1995, with the exception of his own income. It was further found by the Administrative Law Judge that K.S.A. 44-505 does not apply to the respondent Cook Construction. (August 15, 1997, Order.) That Order was not appealed.

The Kansas Workers Compensation Fund was impleaded on October 30, 1996, and is a party to this action. An amended E-1 Application for Hearing was filed by claimant on July 18, 1997, listing Clifton Homes, Inc., as the employer and the resulting preliminary hearing of September 9, 1997, is the subject of this appeal.

With regard to claimant's contention that respondent's appeal to the Appeals Board was untimely, K.S.A. 44-551, as amended, requires review by the Appeals Board upon written request of any interested party within ten days. K.A.R. 51-18-2 states that "the effective date of the administrative law judges' acts, findings, awards, decisions . . . shall be the day following the date noted thereon by the administrative law judge." The transcript of September 9, 1997, stands as the order of the Administrative Law Judge. The administrative regulation would then make September 10, 1997, the effective date. K.A.R. 51-17-1 states that when computing the time within which an act shall be done the first day is excluded. Therefore, the effective date of September 10, 1997, will not be counted when considering the ten-day limitation of K.S.A. 44-551, as amended. In addition, the Kansas Court of Appeals in McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996) found that K.S.A. 60-206 applies to workers compensation matters when computing time limits of 11 days or less. The Kansas Legislature, in following the Court of Appeals lead in McIntyre, *supra*, amended K.S.A. 44-551 to adopt the McIntyre computation method which excludes Saturdays, Sundays, and legal holidays from the

computation. Claimant acknowledges respondent's application was filed on September 24, 1997. The decision of the Administrative Law Judge dated September 9, 1997, became effective on September 10, 1997, and the first day in the ten-day countdown would be September 11, 1997. In computing the time limits pursuant to K.S.A. 44-551, as amended, the tenth day following the September 9, 1997, decision would be September 24, 1997. Therefore, the appeal by respondent would be timely.

Respondent contends claimant failed to file written claim pursuant to K.S.A. 44-520a. A review of the preliminary hearing transcript fails to find this issue presented to the Administrative Law Judge. K.S.A. 1995 Supp. 44-555c(a) limits the review of the Appeals Board to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

The Appeals Board has held on many occasions that an issue not raised before the administrative law judge will not be considered by the Appeals Board. Therefore, respondent's contention that claimant failed to file timely written claim will not be considered until the issue is presented to and considered by the Administrative Law Judge.

With regard to whether claimant is entitled to workers compensation benefits as a statutory employee or as an independent contractor, the Appeals Board looks to the language of K.S.A. 1995 Supp. 44-508(b) which limits the terms "workman", "employee", or "worker" as follows:

Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a and amendments thereto, such terms shall not include individual employers, limited or general partners or self-employed persons.

In addition, the Kansas Legislature on July 1, 1997, amended K.S.A. 44-505(a)(2) to apply the Workers Compensation Act:

where the employer is a self-employed subcontractor under circumstances wherein K.S.A. 44-503, and amendments thereto, would otherwise apply

K.S.A. 44-505(a) was amended to exclude the term self-employed subcontractor from the limitations set forth in K.S.A. 44-508(b), above. A legislative intent to bring self-employed subcontractors within the framework of the Kansas Workers Compensation Act is displayed by this statutory modification. This further indicates that a self-employed subcontractor was not covered by the Workers Compensation Act prior to the July 1, 1997, modifications.

Wherefore, the Appeals Board finds that claimant, a self-employed subcontractor of Cook Construction, does not qualify under K.S.A. 1995 Supp. 44-508(b) as a worker,

employee, or workman and the Kansas Workers Compensation Act does not apply to this accident. Therefore, benefits cannot be awarded claimant as a result of the injury suffered December 11, 1995, and the order of the Administrative Law Judge is reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the order of September 9, 1997, granting claimant benefits should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

c: Mike Allen, Liberal, KS
Richard L. Marquez, Garden City, KS
Douglas M. Crotty, Garden City, KS
Wendel W. Wurst, Garden City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director